

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP484

Cir. Ct. No. 2002CV290

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GROEPPER EXCAVATING LLC,

PLAINTIFF-RESPONDENT,

V.

MARTY REINIER,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,**

GEORGE GUE AND HELENA WATTS,

THIRD-PARTY DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dunn County:
WILLIAM C. STEWART, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. George Gue and Helena Watts (collectively “Gue”) appeal a money judgment in favor of Marty Reinier and Groepper Excavating. Gue argues the circuit court erred by concluding Gue was liable to Reinier and Groepper for costs arising from the construction of a deck. Gue also contends the circuit court erroneously denied Gue damages for unfinished and defective work, as well as the claimed wrongful destruction of trees on his property. We reject Gue’s arguments and affirm the judgment.

BACKGROUND

¶2 In May 2000, Gue contracted with Reinier, an Amwood Homes dealer, for the construction of a new home. Although there is no written document signed by both parties setting forth the terms of the agreement, there are documents reflecting the specifications for the base home and an estimate totaling \$226,783 for the construction of that home. The circuit court characterized the parties’ understanding as a “time and material” agreement, with some pre-determined caps on selected components. During the home’s construction, Gue periodically requested changes and raised any issues he had with the construction. In correspondence to Reinier near the end of November 2000, Gue itemized numerous construction issues he wanted addressed and notified Reinier that a penalty would begin to accrue on December 1, 2000, if the dwelling was not ready for occupancy by that date. Gue moved into the house at the beginning of January 2001.

¶3 Throughout construction, Reinier submitted five invoices for completed work and Gue remitted payment. In the summer of 2001, Gue met with Reinier and Groepper regarding excavation work and construction of a deck. After the deck was completed, Reinier submitted a sixth invoice in the amount of

\$10,042.35 for materials and construction, in addition to \$952.13 for Groepper's excavation work. According to Reinier, Gue informed him that he wanted to pay Groepper directly.

¶4 Ultimately, in September 2002, Groepper commenced a small claims action against Reinier seeking payment for the excavation work. In turn, Reinier impleaded Gue, denying responsibility for the payment owed to Groepper and seeking \$10,042.35 from Gue for the deck's construction. After a court trial, the court awarded Reinier and Groepper the respective amounts they sought for materials, construction and excavation, offsetting Reinier's award by amounts Gue paid for rent and storage arising from the delayed occupation of the home. This appeal follows.

DISCUSSION

¶5 Gue argues the circuit court erred by concluding that he was liable to Reinier and Groepper for the costs arising from construction of the deck. Specifically, Gue contends that he did not contract directly with Groepper for the excavation and he cannot, therefore, be liable to Groepper for the excavation cost. Next, Gue claims that his initial agreement with Reinier was a fixed price contract that included the cost of deck construction. Finally, Gue argues the circuit court erroneously denied him damages for unfinished and defective work, as well as the claimed wrongful destruction of trees on his property. Essentially, Gue challenges the sufficiency of the evidence to support the court's judgment.

¶6 When considering the sufficiency of the evidence, we apply a highly deferential standard of review. The trial court's factual findings will not be reversed unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (2003-04). We review the record in the light most favorable to the trial court's findings to

determine whether the findings are clearly erroneous. *Rohde-Giovanni v. Baumgart*, 2003 WI App 136, ¶18, 266 Wis. 2d 339, 667 N.W.2d 718. “When we undertake to determine whether a finding is clearly erroneous, rejection is not warranted merely because there is evidence in the record to support a contrary finding. The contrary evidence, rather, must constitute the great weight and clear preponderance of the evidence.” *Id.* (citation omitted). The credibility of witnesses and the weight to be attached to that evidence are matters uniquely within the province of the trial court when it acts as the finder of fact. *See Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

¶7 Here, Groepper testified that he did some excavation work on Gue’s property during the initial construction of the house. Groepper further testified that in May 2001, he met with both Gue and Reinier regarding excavation work necessary for construction of a deck. According to Groepper, he took directions at that time directly from Gue regarding the work to be done and sent the invoice to Reinier out of habit, as that is what he had done during the house’s construction. The circuit court ultimately found that Groepper’s excavation work during the summer of 2001 was not included in the original estimate for construction of the house, and that Gue was directly responsible to Groepper for the payment sought. The evidence supports the court’s conclusions.

¶8 With respect to the deck’s construction, Gue challenges the court’s conclusion that the house was built under a “time and material” contract, claiming instead that the original estimate constituted a fixed-price contract. Our supreme court has recognized that “[w]hen one hires a contractor to do work and does not make a specific contract for a definite sum, it is generally understood to be for time and material as that contractor does business.” *LaVelle v. DeLuca*, 48

Wis. 2d 464, 469, 180 N.W.2d 710 (1970). Here, the subject document, by its terms, declares “this form is for estimating purposes only.” Consistent with a time and material contract, Gue testified at trial that there were numerous upgrades and modifications that were either requested or agreed to during construction. Gue nevertheless intimates that because the original estimate included a \$9,600 quote for construction of a deck, he has already paid for the deck. A review of the five invoices submitted during the house’s construction, however, supports the circuit court’s finding that Gue was neither billed for nor did he pay for the deck materials or construction. The deck was completed in late summer 2001 and the sixth invoice, requesting payment for the deck’s construction, was sent to Gue in December 2001. The evidence supports the court’s conclusion that Gue is responsible to Reinier for the cost of constructing the deck.

¶9 Turning to Gue’s counterclaim, Gue argues he was entitled to recoup amounts paid over the contract price for subcontractors hired directly by him to either remedy defects or complete unfinished items. As to unfinished items, this argument assumes, however, that the parties entered into a fixed-price contract. As noted above, the evidence supports the circuit court’s conclusion that the parties entered into a time and materials contract. Gue’s claims of “overpayment” therefore fail. To the extent Gue claims he is entitled to damages for the quality of Reinier’s work, Gue signed a document on January 25, 2001, accepting the home as completed with three specific exceptions that were either completed or corrected during the first few months of 2001. Moreover, James Townsend, a field supervisor for Amwood Homes, testified that during conversations with Gue in 2001, Gue did not criticize Reinier’s work and indicated he was very satisfied with the home. The evidence supports the circuit court’s conclusion that Gue was not entitled to damages for his claims of defective or unfinished work.

¶10 Although the circuit court offset Reinier's award by amounts Gue paid for one month's rent and storage arising from the delayed occupation of the home, Gue argues he should have received an offset for the amount of two months' rent and storage. Gue occupied the home in early January 2001, one month later than Gue directed the home to be completed. An offset of one month's rent and storage is therefore supported by the record.

¶11 Finally, Gue contends the circuit court erred by denying him damages for the claimed wrongful destruction of five trees on his property. In his counterclaim, Gue alleged for the first time that a subcontractor cut down the wrong trees. Although it is undisputed that trees were removed from the building site, there was no evidence regarding the size or location of the subject trees, nor when or by whom they were removed. Gue alleged each tree was worth \$200; however, "the weight to be attached to a non-expert owner's testimony is for the trier of fact." *D'Huyvetter v. A.O. Smith Harvestore*, 164 Wis. 2d 306, 323, 475 N.W.2d 587 (Ct. App. 1991). Ultimately, the circuit court concluded the record was insufficient to support Gue's claim for damages arising from the removal of trees. Because the record supports the circuit court's conclusions, we affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

